

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

To be argued by
JEROME J. LONDIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1048

UNITED STATES OF AMERICA,

Appellee,

-against-

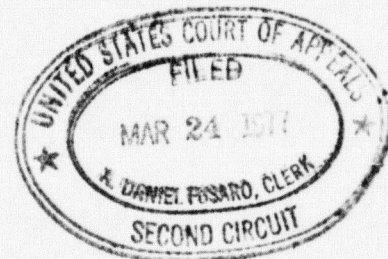
CARL W. ANDERSON,

Appellant.

APPELLANT ANDERSON'S REPLY BRIEF

CARRO, SPANBOCK, LONDIN, RODMAN & FASS
1345 Avenue of the Americas
New York, New York 10019
Attorneys for Appellant Anderson

JEROME J. LONDIN
Of Counsel



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INTRODUCTION

This brief of appellant Anderson is in reply to the Government's page proof. As evidenced by its reckless disregard and distortion of the record, ignoring the teaching of Berger v. United States, 295 U.S. 78 (1935), the Government is determined to preserve a conviction it obtained through the perjurious testimony of three witnesses -- Clinton, Gamelson and Smith, their concoction of crucial Gov. Ex. 113,

and their suppression of material documents which would have exposed their corruption. After Anderson's trial, all this was discovered in civil litigation brought by the New York Stock Exchange against Clinton Oil Company. The pre-trial order of Milbank, Tweed on behalf of the New York Stock Exchange painted Clinton Oil Company and its former minions (Clinton, Gamelson and Smith) as co-conspirators with Sloan and others -- not as the distinguished lawyers the Government said some of them were. Rather than litigate the issues raised, which questioned the very integrity of the documents used against Anderson in his criminal trial (including the so-called September 4, 1969 telegram which allegedly repudiated the 80,000 share trade), Clinton Oil Company's new management and counsel, Simpson, Thacher & Bartlett, settled the case.

THE PERJURY OF CLINTON

Contrary to the Government's denial of Clinton's perjury and his participation in the presentation of spurious Gov. Ex. 113 at Anderson's trial and the suppression of material documents given to him (Gov. Br. pp. 19-20), the proof at the Rule 33 motion was uncontradicted. There has been not one affidavit from Clinton, Gamelson or Smith -- or the Government -- nor even one word in explanation of their absence.

Relying solely on ipse dixit, the Government denies perjury, fabrication of Gov. Ex. 113 and suppression. The Government states: "The very existence of the documents at a later date proved that no one undertook to destroy these materials" (Gov. Br. p. 20).

On the contrary, what surfaced at a later date were not the originals of the documents which had in fact disappeared from the files of Clinton Oil Company, but only copies thereof which had been misfiled and thus fortuitously found years later by Messrs. Simpson, Thacher & Bartlett, new counsel to Clinton Oil Company, after Clinton, Gamelson and Smith had been thrown out of the company.

Immediately recognizing the significance of these documents, Simpson, Thacher & Bartlett made them available to Milbank, Tweed, Hadley & McCloy, counsel to the New York Stock Exchange in the civil litigation. The civil depositions of Gamelson and Smith disclose their surprise and chagrin at the discovery of these materials.

The Government's exertion to explain the spurious Gov. Ex. 113 as the final version of a "rough draft" is simply incredible in view of the fact that, known to Clinton, Gamelson and Smith, the "deletions made by Gamelson" involved the report

of Gamelson and Smith to Clinton of the very discussions concerning the trade with the Clinton Oil Pension Fund which they denied on the witness stand at Anderson's criminal trial.

The suppression of the crucial documents cut off effective cross-examination of Clinton, Gamelson and Smith in limine concerning all the matters therein -- whether Anderson knew the confirmation had gone out, whether Anderson knew of "the parking operation" or was in fact ignorant of Sloan's conspiracy with Clinton Oil Company, Clinton's various offers to help Orvis, Gamelson's phone conversations with Richter and Sloan, Clinton's conversations with Sloan, etc.

At Anderson's trial Clinton deliberately lied when he identified spurious Gov. Ex. 113 as the memorandum he received from Gamelson and Smith of their August 28th meeting with Anderson at Orvis (Tr. 2207-8; App. C to Anderson's R. 33 motion).

The actual memorandum was "dictated by telephone to a secretary [Fornshell] who then typed it up and put it on Mr. Clinton's desk" (App. P, p. 117 of Anderson's R. 33 motion). That memorandum, identified by the secretary, Fornshell, as Plf's. Ex. 338, together with Depo. Ex. 351, the transcription of her shorthand notes on Plf's. Ex. 338, appear in Anderson's

appendix to this appeal (A 21-23). Among other things excised from the spurious Gov. Ex. 113 (A 19-20), specific mention is made of a 70,000 share sale at \$11 a share by Orvis to a Clinton Pension Fund as an offer by Rick Clinton to help Orvis.

Fornshell remembered not only discussing it with Gamelson, but with Clinton as well (App. M, pp. 36-7 of Anderson's R. 33 motion).

Furthermore, in identifying spurious Gov. Ex. 113 as the authentic Gamelson-Smith memorandum to him, even though he knew the reference to the Clinton Pension Fund trade had been deliberately excised from the authentic memorandum that he had previously received from and discussed with Fornshell, Clinton wilfully failed to mention Gamelson's note to him specifically about the 80,000 share sale to the Clinton Oil Pension Fund:

"Rick: Bill Anderson and Ferg Sloan in their conversation with Ben Smith and me, referred to this deal." (A 24-25).

THE GOVERNMENT'S USE OF GAMELSON AND SMITH

Attempting to minimize its use of Gamelson and Smith, whose testimony, fabrication of Gov. Ex. 113 and suppression of material documents perjuriously stressed

Anderson's alleged failure to mention the 80,000 share trade or his belief in the existence of the Clinton Oil Pension Fund, the Government says that Gamelson and Smith cannot be characterized as its main witnesses (Gov. Br. p. 23).

On the contrary, on the issue of the 80,000 share trade, Gamelson and Smith, along with Clinton, were the only witnesses. Along with Clinton, Gamelson and Smith were the only witnesses who denied that the existence of the Clinton Oil Pension Fund, the purchaser of the 80,000 shares, whose existence was raised by Clinton. It was only Clinton, Gamelson and Smith who denied the bona fides of the 80,000 share trade.

As far as everyone at Orvis, except for Sloan, knew, it was a bona fide sale, properly carried on Orvis' books even though Clinton had not yet paid for the stock. The Government contends that, notwithstanding the fact that only Clinton, Gamelson and Smith disputed the bona fides of the sale, the real damage to Anderson on this score was done by Kilduff (Gov. Br. p. 7).

On the contrary, Kilduff testified he thought it was a good trade until May 1970. The trade's bona fides was not negated by Clinton's failure to make timely payment. On the contrary, Haskins & Sells was fully aware of this and,

in their audit report Form X-17A-5, Haskins & Sells specifically footnoted this transaction and others as follows:

"A reserve has been provided for accounts considered doubtful of collection; . . ."

Contrary to the Government's argument that the placing of the trade on the books before the running of the five-day settlement period was improper and, accordingly was evidence harmful to Anderson (Gov. Br. p. 7), the Orvis partner who took the order from Sloan, Tournet, called by the Government, testified as follows on direct examination:

"Q. So Mr. Sloan asked you to make settlement as of August 28th; is that correct?

"A. That is correct.

THE COURT: There is nothing illegal about that.

THE WITNESS: No, sir, not at all. In many cases they want to settle the same day for various reasons, your Honor.

MR. LONDIN: Do I understand you to say this is not uncommon?

THE WITNESS: It is not uncommon, no, sir." (Tr. 847).

In summation, the Government referred to Gamelson as "the distinguished lawyer." If Gamelson and Smith were not so important, why did the Government call them?

Astoundingly, the Government claims that the trial testimony of Gamelson and Smith was not perjurious because

they could not be expected to recall the discussion of the 80,000 share trade "several years later", and, furthermore, Anderson "has repeatedly failed to explain how could it be worth their [Gamelson's and Smith's] while to commit perjury by denying a mere discussion of the 80,000 share transaction" (Gov. Br. p. 21). The motives of Gamelson and Smith, as well as those of Clinton, to commit perjury are set forth at pages 7-9 of Anderson's brief on this appeal, which the Government has deliberately ignored. Moreover, as pointed out in Anderson's brief in chief on this appeal at page 22, the perjuries of Clinton, Gamelson and Smith did not spring full blown at Anderson's criminal trial. On the contrary, their lies, fabrication and suppression commenced when they first testified before the S.E.C. on January 13, 1972. Their trial testimony was a continuation of that corruption, when they told the same lies, produced the same phony exhibit and suppressed the same crucial documents.

Having ignored the motivation for the longstanding documented perjury of its witnesses, the Government continues at p. 21 of its brief by distorting Gamelson's civil deposition. The quoted portion of Gamelson's testimony was given before he was confronted with his suppressed documents. On being confronted with the suppressed documents emanating from him,

Gamelson changed his tune. Far from contradicting Anderson's claim that the newly discovered evidence shows it was Clinton's suggestion to buy the stock through a Clinton Oil Pension Fund, Gamelson's testimony, in which he admitted authorship of the suppressed documents while ascribing significant portions to Smith, supports Anderson's claim of perjury, fabrication and suppression.

Continuing at p. 22 of its brief, without any support whatsoever, and, indeed, contrary to the record (A 26-27), the Government concocts the outrageously false argument that the parking operation between Sloan and Gamelson was discussed and reached by telephone in Anderson's presence on August 28th at Orvis. Gamelson's suppressed memorandum to Clinton of his telephone conversations with Richter and Sloan (A 26-27) clearly show that these discussions occurred by telephone on September 4, 1969. The only reference therein to Anderson is Richter's reply to Gamelson that "it may be that Mr. Bill Anderson did not know anything about it [the confirmation having gone out]."

THE CROSS-EXAMINATION OF ANDERSON

Contrary to the Government's allegation that the perjury, fabrication of Gov. Ex. 113, and document suppression

by Clinton, Gamelson and Smith was not used to impeach Anderson on cross-examination (Gov. Br. p. 23 fn.), that cross-examination, quoted at p. 28 of Anderson's brief on this appeal, sought to negate Anderson's belief in the bona fides of the 80,000 share trade with the Clinton Oil Pension Fund -- a transaction that was discussed in the suppressed documents and physically excised from Gov. Ex. 113.

The Government emphasized its cross-examination of Anderson in summation, telling the jury that: "Mr. Anderson doesn't remember that part either. [Clinton's allegedly saying that:] I don't have a Clinton Oil Pension Fund" (Anderson's Br. p. 30).

THE SIGNIFICANCE OF THE CLINTON-GAMELSON-SMITH
PERJURY, FABRICATION OF GOV. EX. 113 AND
SUPPRESSION OF MATERIAL DOCUMENTS CONCERNING
THE 80,000 SHARE TRADE

Three-fourths of the Government's case concerned transactions between Orvis and Clinton Oil Company. True it is that the fortuitous discovery of the perjury of Clinton, Gamelson and Smith, their concoction of Gov. Ex. 113, and their suppression of the documents which would have disclosed their corruption relate to the 80,000 share trade. However, contrary to the Government's claim (Gov. Br. p. 18), it also

relates to the other transactions between Orvis and Clinton Oil Company in the case, because it questions the very integrity of the dozens of other Clinton Oil Company documents used to convict Anderson.

The 80,000 share trade involving \$880,000 was the largest transaction in the case, notwithstanding the Government's contention to the contrary (Gov. Br. p. 18). The Government claims that all that was involved in the 80,000 share trade was a 30% "haircut." If that is the case, why did the Government stress in summation, relying upon the perjurious testimony of Gamelson and Smith (which was known to Clinton, because he received their original memorandum from Fornshell as well as the other suppressed documents from Gamelson), that Anderson failed to mention the trade, saying: "Not one word about an \$880,000 deal" (Anderson Br. p. 30)?

Moreover, the Government's 30% "haircut" argument (Gov. Br. p. 18) is equally applicable to the \$400,000 Fund of Letters trade, whose dollar amount was substantially less than half of the dollar amount of the 80,000 share trade. The Fund of Letters trade was not the subject of any conspiracy. Everyone knew about it, and everyone attacked Anderson for not consummating the transaction. Haskins & Sells knew about it and set up a reserve for a receivable "doubtful of collection."

As for the \$797,100 receivable, erroneously claimed by the Government to exceed the \$880,000 trade in its effect on the audit (Gov. Br. p. 18), Kilduff never said Anderson told him how to enter the receivable, nor did Kilduff say Anderson ever knew it was entered in a customer's cash account. Moreover, on August 5, 1969 -- before the audit by Haskins & Sells as of August 31, 1969 -- Kilduff instructed Michael, Orvis' comptroller (Tr. 879), to accrue only one-third of the receivable. However, Michael did not understand and left the entry on the books (Tr. 888-9, 894-6; Defendant's Tr. Ex. 2; Gov. Tr. Ex. 44). Had Michael followed Kilduff's instructions there would have been no issue as to this account, because \$290,000 had actually been received and credited to that account prior to August 31, 1969 (Tr. 243-4, 712). Finally, as of the August 31, 1969 audit, 70% of the actual receivable -- over \$700,000 -- was then payable and was properly computed in capital. It was in fact "good capital" on August 31, 1969.

Not satisfied with these distortions, the Government recklessly and erroneously accuses Anderson's counsel of attempting "to make the newly discovered evidence appear grander than it really is" (Gov. Br. p. 18 fn.). Ignoring

its extensive use of the perjury in summation, the Government falsely claims that, although Anderson alleges the Government's original appellate brief mentioned the subject four times, on this appeal Anderson has given only two page citations for the four references "without explaining what specifically was mentioned."

On the contrary, all four page references together with the specific language from the Government's original brief are set out at pages 31-32 of Anderson's brief on this appeal. The two pages to which the Government referred from page 3 of Anderson's brief on this appeal referred only to two of those four instances -- the first when the Government's original appellate brief thought the matter so significant that it italicized the language in question, and the second when it referred to the testimony of Clinton, Gamelson and Smith as "Especially damaging."

Moreover, contrary to the record, and ignoring the four quoted instances set out at pages 31-32 of Anderson's brief on this appeal, the Government makes the astounding statement (Gov. Br. p. 18 fn.) that "in marshalling the evidence against Anderson for the purpose of demonstrating sufficiency the Government's brief on appeal never mentioned the 80,000 share trade, nor did this Court refer to it in

finding the evidence against Anderson to [b]e sufficient."

In affirming Anderson's conviction, this Court said:

"At the time this purported [80,000-share] sale was taking place, general counsel for Clinton was in New York * * * Clinton's counsel was not informed of the 'sale' of Clinton stock and did not learn about it until his return to Kansas * * *" 532 F.2d at p. 253.

Respectfully submitted,

\ CARRO, SPANBOCK, LONDIN, RODMAN & FASS
Attorneys for Appellant Anderson
1345 Avenue of the Americas
New York, N. Y. 10019
212-757-2400

Jerome J. Londin,
of counsel.

CARRO, SPANBOCK, LONDIN, RODMAN & FASS
10 EAST 40TH STREET
NEW YORK, N.Y. 10016

